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No. 91-864

In The

Supreme Court of the United States

October Term, 1991

FIRST AMERICAN ARTIFICIAL FLOWERS, INC.,

Petitioner,

vs.

ALVIN PROMISEL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a district court have power to exercise pendent jurisdiction over a state law claim of age discrimination in an action under the Age Discrimination in Employment Act of 1967 where the federal and state claims derive from a common nucleus of operative facts and are such that a plaintiff would ordinarily be expected to try both claims in one judicial proceeding?

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RESPONDENT'S BRIEF IN OPPOSITION

Alvin Promisel ("Promisel"), the respondent in this case, respectfully submits this brief in opposition to the petition of First American Artificial Flowers, Inc. ("petitioner" or "First American"), for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming a judgment of the District Court for the Southern District of New York following a jury verdict awarding money damages to

Promisel for unlawful age discrimination in employment.

COUNTERSTATEMENT OF FACTS

Although petitioner seeks to characterize this case as one that raises important and unresolved issues of federalism, election of remedies, joinder of state claims for purposes of enhanced damage awards, and principles of preemption arising out of the construction of the Age Discrimination in Employment Act of 1967, 29 U.S.C § 621 *et seq.*, this characterization is misleading.

Procedural Background

This is an action authorized and instituted (a) pursuant to § 7 of the Age Discrimination in Employment Act of 1967, 19 U.S.C. § 626 ("ADEA") which incorporates by reference § 16(b) of the Fair Labor Standards Act of 1938, 19 U.S.C. § 216(b); (b) pursuant to § 502 of the Employee Retirement Income Security Act of 1974, 19 U.S.C. § 1132 ("ERISA"); and (c) pursuant to New York Executive Law, § 296 ("Executive Law"). Jurisdiction of the federal claim was predicated on 28 U.S.C. §§ 1331, 1337, 1343, and jurisdiction of the state-based claim on principles of pendent jurisdiction.

Jurisdiction of the Executive Law claim was predicated on principles of pendent jurisdiction, but there is also diversity jurisdiction under 28 U.S.C. § 1332. Promisel alleged in paragraph 3 of the complaint that he is a citizen and resident of the State of New Jersey and in paragraph 5 thereof that First American is a corporation and a citizen of the State of New York, having its principal place of business in Blauvelt, New York. The complainant did not, however, plead the requisite amount in controversy, $10,000 at the time. Promisel proved his citizenship and residence at trial, and First American admitted in its answer the allegations in paragraph 5 of the complaint. The amount of

the money judgment far exceeded the $10,000 jurisdictional amount. Thus, diversity of citizenship under Section 1332 is an independent and alternative basis for the District Court's exercise of power over the state-based claim.

Since this action was commenced, the doctrine of pendent jurisdiction was codified in the Judicial Improvements Act of 1990 (P.L. 101-650) which adds a new section 1367 to title 28 of the United States Code, effective December 1, 1990. Under section 1367(a), as long as a district court has original jurisdiction over a claim it "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Thus, the 1990 Act indicates that Congress wants supplemental jurisdiction to go at least as far as the holding in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), subject to its declination as a matter of judicial discretion for the compelling reasons specified in subparagraph (c) of section 1367. In actions commenced before December 1, 1990, the pendent jurisdiction doctrine as it existed under case law should govern, although the intent of this new statute may have a bearing on the exercise of discretion previously recognized in the case law.

On appeal to the Second Circuit from the judgment of the District Court, First American raised only the following issues: first, the District Court lacked subject matter jurisdiction over the state-based claim; second, the District Court erred in failing to offset damages by unemployment compensation and social security benefits; and third, the District Court erred in denying summary judgment, and the alternative motions for judgment n.o.v. or a new trial.

The centerpiece of First American's subject matter jurisdiction argument in the Court of Appeals was that section 633(a) of the

ADEA, which provides that the filing of a federal ADEA claim "supersedes any state action," operates to preclude federal courts from considering pendent state claims in ADEA suits. The sole support for this argument was *Pandis v. Sikorsky Aircraft Div.*, 431 F. Supp. 793 (D. Conn. 1977), a case the Circuit Court held is not authority for that proposition. Petitioner has abandoned this argument. Petitioner is now asserting a "partial" preemption or election of remedies argument. First American did not assert preemption or election of remedies arguments in the District Court or in its brief in the Court of Appeals. In fact, when asked during oral argument in the Court of Appeals whether First American was asserting a preemption argument, First American' s counsel unequivocally represented that preemption is not an issue in the case. *See DeShaney v. Winnebago County DSS*, 489 U.S. 189, 195 (1989); *Lawn v. United States*, 355 U.S. 339, 362 (1957) (held: the Court will decline to consider arguments made for the first time in this Court absent exceptional circumstances). In rebuttal oral argument, First American's counsel, for the first time, asserted an election of remedies argument which had not been briefed. Under the rules of the Court of Appeals, Promisel's counsel was not given an opportunity to respond to this late-blooming contention.

Execution of the money judgment was stayed pending appeal, and an appeal bond was furnished. Following the issuance of the mandate by the Court of Appeals, First American moved in the Circuit Court to stay the mandate pending the filing of a petition for writ of certiorari. That motion was denied. Then, First American filed simultaneous applications for a stay, one in this Court, and the other in the Circuit Court under the guise of a motion to recall the mandate. Both applications were denied. Substantially all of the money judgment has been collected.

Factual Background

The facts of this case are simple. In summary, Promisel, who was 63 when discharged in December 1987, was a 13-year veteran of First American, a company engaged in the artificial flower business. His last position was as sales manager, a job he held for 15 years. Promisel and First American entered into an agreement effective May 4, 1987 pursuant to which Promisel would work fewer hours at reduced pay and would have a six-week vacation, three weeks with pay and three weeks without pay. Promisel's job duties and responsibilities remalned the same, with the additional responsibility beginning in September 1987 of training a newly hired salesperson who ultimately replaced Promisel in his job.

Promisel had an unblemished performance and attendance record, nevertheless he was abruptly discharged without warning the first business day after he left for an authorized vacation in December 1987. Promisel was in all respects qualified to continue on the job, having been in the sales manager position since 1971. His work as sales manager produced positive financial results for First American, and he even trained his replacement, albeit unwittingly.

The evidence showed that First American had determined to replace Promisel with a younger employee at least as far back as January 1987 when First American's president sent one of the drivers Promisel supervised, a man in his thirties, in his place on a business trip to Puerto Rico, a market that Promisel had been developing for many years and had been selling and servicing on semi-annual trips. That employee did not work out as a replacement, so First American advertised for a salesperson, and hired a 30-year old who had no prior experience in the artificial flower business. First American's officer told this new recruit during the employment interviews that he wanted him to replace

an "older gentleman," and that he wanted "younger blood," someone who was "aggressive," somebody "who could hit the pavement." This employee was hired in September 1987 at compensation equal to 80% of Promisel's compensation.

Promisel was directed to train this new employee in his job tasks, and he did, so successfully that after only three months the new salesperson felt comfortable taking over Promisel's duties when the latter went on vacation. The day after Promisel left on holiday just before Christmas in 1987, he was discharged by letter from First American mailed by express mail to his sister's home in Florida. The letter did not state a specific reason for the abrupt discharge. The very day Promisel was arbitrarily discharged — the first business day after he left for vacation — his job duties and responsibilities were assumed by the 30-year old salesperson he had trained.

Following his discharge, Promisel filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (In the Circuit Court opinion, the Court mistakenly stated that Promisel also filed a charge of discrimination with the New York State Division of Human Rights ("NYSDHR"); whether or not the charge was filed in both forums is of no consequence one way or the other.) The record shows that Promisel filed a charge of discrimination with the EEOC which was transferred by the EEOC to the NYSDHR for investigation because New York is a deferral state. Subsequently, the complaint transferred to the NYSDHR was dismissed by the state agency on the grounds of administrative convenience because the matter was being litigated in this action. First American's counsel stipulated at trial to these facts, thereby avoiding proof of facts on this matter.

In New York, transfer of a charge of age discrimination to the NYSDHR for investigation is mandatory. *See Oscar Mayer*

& Co. v. Evans, 441 U.S. 750, 758 (1979). Upon transfer, the NYSDHR begins to conduct an investigation. After the prescribed statutory time limits have expired, the complainant informs the NYSDHR that he or she is about to commence an action in federal court. Typically, the person assigned to the matter in the NYSDHR informs the complainant's counsel that the complaint will be dismissed after the federal action has been commenced and a copy of the summons and complaint is filed with the NYSDHR. When that is done, the matter is submitted for a determination and order after investigation in which the NYSDHR finds that noticing the complaint for hearing would be undesirable; the complaint is ordered dismissed on the grounds of administrative convenience because processing the complaint will not advance the State's human right's goals, inasmuch as the matter is presently being litigated in federal court in which forum all the issues concerning the question of age discrimination can be resolved. The determination and order after investigation may not be issued for a matter of some months due to the backlog of work in the state agency. This is the procedure that was followed in this case, with the result that the transferred complaint was dismissed for administrative convenience.

Section 297(9) of the Executive Law creates a cause of action for damages and such other remedies as may be appropriate, and further provides ". . . where the Division has dismissed such [age discrimination] complaint on the grounds of administrative convenience, such person [the complainant] shall maintain all rights to bring suit as if no complaint had been filed." The dismissal for administrative convenience vitiates any purported election of remedies under the state law. *See* Executive Law § 297(9). Section 297(9) of the Executive Law allows a complainant to commence an action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate for a violation of Executive Law § 296(1)(a) which prohibits age discrimination in employment. Thus, a person aggrieved by a discriminatory

practice unlawful under the New York State human rights law has a cause of action for money damages and other appropriate remedies, independent of the ADEA claims and remedies, which can be prosecuted in any court of appropriate jurisdiction. Federal and state courts have concurrent jurisdiction over ADEA suits. 29 U.S.C. § 626(c).

The evidence at trial demonstrated that Promisel was in all respects qualified to remain in the job. He had been in the position for some 15 years. His record of achievement in sales was substantiated by the financial results obtained. His training of his successor in the job speaks for itself. There was ample evidence that age was a determinative factor in Promisel's discharge. Among other facts, testimony of the employee who replaced Promisel demonstrated that First American had planned for months to replace Promisel with this 30-year old employee. The fact that he actually assumed Promisel's job responsibilities immediately upon his discharge, a fact that was admitted by First American's chairman in his letter to the NYSDHR during the investigation phase, is direct evidence that age was a determinative factor. This was a strong case. The testimony of First American' s chairman demonstrated conclusively that First American did not have a valid, credible business reason for discharging Promisel. No evidence was offered by First American to show that Promisel's job performance had anything whatsoever to do with his discharge.

Promisel's termination was abrupt. There was no pension. Accrued vacation pay was withheld. Promisel received no assistance in relocating, was not provided with any outplacement services, and may even have been blackballed by First American. His efforts to find suitable employment elsewhere in the industry were futile. He was forced to retire prematurely.

The trial judge submitted the ADEA and Executive Law claims to the jury with a special verdict sheet. First American's

trial counsel did not object to the charge to the jury and did not ask for additional instructions. The special question whether Promisel was entitled to an award for mental anguish and emotional distress on his claim under the Executive Law was answered in the affirmative by the jury. First American protests in footnote 4 of the petition that there was virtually no evidence at trial concerning emotional distress. It was petitioner's trial counsel who, upon cross-examination of Promisel, elicited the fact, among others, that Promisel was depressed as a consequence of his unlawful discharge. There was no jury confusion. First American did not request a bifurcated trial, and the issue of damages on both the ADEA and Executive Law claims was dealt with in specific questions to the jury. *See Martel v. Dean Witter Reynolds Inc.*, 738 F. Supp. 53, 57 (E.D.N.Y. 1990).

First American tried this case with a singular, narrowly focused strategy. From the beginning of the case through the motion for judgment n.o.v., it contended that its acts and conduct did not constitute a violation of the ADEA because Promisel's employment was at will and First American could discharge him at any time and for any reason. Holding firmly to the belief that the at-will employment relationship took the case outside the scope of protection of age discrimination laws, First American's trial counsel limited its pre-trial motion practice to summary judgment dismissing the complaint for failure to make out a prima facie case of age discrimination. Perhaps in the belief that presenting any countervailing evidence at trial on the issue of damages would be an implicit admission that Promisel was entitled to damages, First American's trial counsel presented perfunctory opposition to the damage claims, and none whatsoever with respect to collateral source payments. This strategy continued through the post-trial motions. This strategy was ineffective, and First American's appellate counsel sought on appeal to attack the jury's verdict on the Executive Law claim on jurisdictional grounds. Having failed to upset the judgment on jurisdictional grounds,

First American is now attempting to challenge the judgment on grounds that not only were not raised on the record below, but insofar as the preemption argument is asserted, were explicitly rejected as the basis of its appeal at oral argument in the Court of Appeals.

REASONS FOR DENYING THE WRIT

Rule 10 of this Court specifies circumstances in which this Court will exercise its judicial discretion to review a Court of Appeals decision on writ of certiorari. Rule 10 indicates the types of special and important reasons that will be considered. Petitioner has failed to identify any conflict among the circuits or any conflict between the Second Circuit's decision herein and the decision of any state court of last resort on the availability of damages under state laws prohibiting age discrimination when prosecuted in federal court. It is not a reason for review by this Court that the decision herein may conflict with Colorado District Court holdings, or that a 1989 decision of the Southern District of New York, which is now overruled by the decision herein, reached a different result. Nor has petitioner identified an important question of federal law which should be settled by this Court. Not only has the Second Circuit not decided a federal question in a way that conflicts with applicable decisions of this Court, but the decision herein is manifestly consistent with this Court's holding in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and the congressional purpose of 28 U.S.C. § 1367. In fact, the only decision of another circuit cited by petitioner on the issue presented actually supports the decision herein. *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981) (held: under pendent Washington State discrimination law claim, damages for emotional distress were properly awarded to employee).

This Court's Rule 10.1(c) provides that a writ of certiorari may be granted where an important question of federal law, not

previously decided by this Court has been decided by a United States Court of Appeals. Importance in this context is measured in terms of importance to the general public, and frequently involves issues of constitutional dimension. *Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 74 (1955). Clearly, this case does not rise to such a level of importance. Despite petitioner's attempt to magnify the precedential value of this case, it must be viewed as what it is — the prosecution of federal and state claims arising out of a common nucleus of operative facts. This case does not break any new ground, and its applicability is essentially limited to New York because it is most unlikely that a New York Executive Law claim will be prosecuted against an employer that does not have its place of business in New York and is therefore not subject to the prohibitions of its human rights law. Thus, the case is not of national significance.

I.

The allegedly conflicting precedents cited by petitioner represent neither the opinions of conflicting circuit courts nor state courts of last resort, thus a writ of certiorari is not appropriate.

As clearly set forth in Rule 10, certiorari is "not a matter of right, but of judicial discretion," and "will be granted only where there are special and important reasons therefor." *See also*, 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4004, at 507 (1977).

In its brief, petitioner points to the purported conflict between the decision herein and *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977) and *Walker v. Pettit Construction Company, Inc.*, 605 F.2d 118 (4th Cir. 1979). Both these cases concern only the measure of damages available under the ADEA, not those available under a state-based age

discrimination cause of action. Petitioner also cites two Colorado district court cases concerning the exercise of power over pendent state claims: *Hensman v. Adams City Dept. of Social Services*, 613 F. Supp. 96 (D.C. Colo. 1985), and *Pascoe v. Hoyle Lowdermilk, Inc.*, 614 F. Supp. 546 (D.C. Colo. 1985). Neither holding is a conflict within the purview of Rule 10. Finally, the holding in *Kelly v. American Standard, supra*, a Ninth Circuit case cited by petitioner, is consistent with the decision herein. It is manifest that the Second Circuit's decision has raised no conflict which warrants this Court granting certiorari.

II.

Petitioner did not rely on preemption in the Court of Appeals, and there is no authority to support "partial" preemption.

Petitioner advances as a reason why its petition should be granted a novel "partial" preemption argument. Petitioner contends that the ADEA does not preempt the prosecution of a state statutory age discrimination claim, but only precludes the remedy provided in the state statute. Petitioner then argues that if this Court should reject its "partial" preemption argument, pendent jurisdiction over the state claim should be declined under the *United Mine Workers* test, without furnishing any real analysis why. These reasons are not only insufficient to warrant this Court's granting a writ of certiorari, but they are also misleading.

As stated above, in response to a question by one of the judges of the Second Circuit at oral argument whether this case involved preemption, petitioner's appellate counsel unequivocally represented that preemption is not an issue in this case. Indeed, such an argument could not be made, for when the ADEA was enacted in 1967, there were 24 states with age discrimination legislation, and other states had passed resolutions declaring age discrimination to be against public policy. 1967 U.S. Code Cong.

& Adm. News p. 2215. At the time of the enactment of the ADEA, New York had a comprehensive human rights law, Executive Law, Art. 15, § 290 *et seq.* Section 296 of the Executive Law prohibits discrimination in employment. Nothing in the ADEA or its legislative history indicates any Congressional intent to preempt state age discrimination laws. Certain federal statutes may preempt state law claims. *See, e.g.*, National Labor Relations Act, 19 U.S.C. § 151 *et seq.* (employee discharge for union organization activities). However, neither Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-7, nor the ADEA preempts state law claims. Moreover, both federal and state courts have concurrent jurisdiction over ADEA cases. 29 U.S.C. § 626(c). Likewise, there is nothing in the ADEA or in the case law that supports the "partial" preemption argument which petitioner claims would allow a state-based age discrimination cause of action to be prosecuted in federal court, but would preclude the complainant from obtaining the benefits of the remedies provided in the state statute, in effect, providing a complainant with a right without a remedy. There is no provision in the ADEA and there is no precedent for this frivolous argument. In fact, the authority to the contrary is overwhelming; in exercising power over state-based claims, federal courts are bound to apply state substantive law to the state claim. "It is the source of the right, not the basis of federal jurisdiction, which determines the controlling law." *See United Mine Workers*, 383 U.S. at 726; *Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir. 1977). Further, in view of the extremely limited monetary remedies available under the ADEA (back pay and liquidated damages in an additional equal amount) the additional damages available under the Executive Law are consistent with national public policy to eradicate arbitrary age discrimination in employment. *See* 29 U.S.C. § 621(b). The availability of such damages in New York is an incentive to employers who might otherwise have a casual attitude toward exposure to ADEA damage awards, which are effectively limited to double the back-pay and are usually payable long after the

unlawful discharge of an employee and after years of hotly-contested, time-consuming, and expensive litigation, to be more observant of the laws prohibiting discrimination against older workers.

III.

The decision herein is consistent with *United Mine Workers*.

The doctrine of pendent jurisdiction, now codified in 28 U.S.C. § 1367, is a creation of case law which recognizes that in the federal system a clalm of wrongful conduct under federal law may aiso give rise to a claim under state law. The doctrine of pendent jurisdiction ailows a plaintiff to prosecute both claims in the federal court, with the state claim being pendent to the federal one and together making up one case. They both arise out of the same event, which is the key factor noted in *United Mine Workers*. Under the doctrine of pendent jurisdiction, which was generously defined in *United Mine Workers*, the federal claim furnishes the jurisdictional support for the state-based claim.

In *United Mine Workers*, the plaintiff asserted a federal claim of violation of the Taft-Hartley Act and a state claim of unlawful conspiracy to interfere with his contract of employment. After a verdict for plaintiff on both the federal and state claims, the trial court held he had failed to establish his federal claim, but entered judgment for him on the basis of the state claims. 220 F. Supp. 871 (E.D. Tenn. 1963). The Court of Appeals affirmed. 343 F.2d 609 (6th Cir. 1965). The Supreme Court, although holding for the defendant on the merits, nevertheless expressly decided there was pendent jurisdiction to decide the state claim. The Supreme Court in *United Mine Workers* departed from the limited approach of *Hurn v. Oursler*, 289 U.S. 238 (1932), which measured the scope of federal jurisdiction in terms of a "cause of action" test, and held that as a matter of constitutional power, pendent

jurisdiction exists whenever the federal and state claims derive from a common nucleus of operative facts and are such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding. 383 U.S. at 725; *Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716, 719 (2d Cir. 1980).

The Circuit Court held that the District Court was fully empowered to exercise pendent jurisdiction over Promisel's state law claim. In applying pendent jurisdiction, federal courts are bound to apply state substantive law to the state claim. *See United Mine Workers*, 383 U.S. at 726; *Van Gemert v. Boeing Co., supra* at 813. It would be anomalous to hold, as petitioner argues, that a federal court is empowered to exercise jurisdiction over a state-based claim of age discrimination, but may not award the remedies available under the state law. Such a holding, in addition to being a radical departure from precedent, would turn a trial of a state claim in federal court into an academic exercise.

IV.

Diversity of citizenship is an independent and alternative basis for the exercise of power over the Executive Law claim.

Respondent did not plead the requisite jurisdictional amount in controversy which is half of the jurisdictional basis for the exercise of original jurisdiction under 28 U.S.C. § 1332. At the time this action was commenced, the threshold amount was $10,000. The judgment far exceeded this sum. Diversity of citizenship was alleged. Promisel proved his citizenship at trial and First American admitted its citizenship in the answer to the complaint. It is conceded the complaint did not satisfy the pleading requirements for diversity jurisdiction. Nevertheless, there was diversity jurisdiction so that, if it had been pleaded, the District Court could have exercised original jurisdiction over the Executive Law claim.

This Court has held that a prevailing party may assert in a reviewing court any ground in support of the judgment whether or not that ground was relied upon or even considered by the courts below. *See Colautti v. Franklin*, 439 U.S. 379, 397 (1979), *citing Dandridge v. Williams*, 397 U.S. 471, 475 (1970). Since the only issue petitioner seeks to have reviewed by writ is the exercise of power over the Executive Law claim, and there is an independent and alternative basis of jurisdiction for that cause of action, it is submitted that the judgment can be affirmed on that ground.

CONCLUSION

There is no significant difference between this case and any other case in which district courts are empowered to adjudicate state-based causes of action either as pendent to a federal claim or independently where diversity exists. The Second Circuit treated the question of pendent jurisdiction in a straightforward manner and decided it as precedent requires. There is no reason to depart from precedent. There is certainly no reason for creating a "partial" preemption rule in age discrimination cases which would effectively deprive a complainant of remedies available under state law. The prosecution of a state-based age discrimination cause of action in federal court, whether as a pendent claim or independently where diversity of citizenship exists, is not in any respect inconsistent with national public policy prohibiting, and federal-state efforts to eliminate, arbitrary age discrimination in employment. *See* 29 U.S.C. §§ 621(b), 626(c), 633.

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JAMES DOLAN
Attorney for Respondent